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Nos. 07-1090 & 08-539

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' MOTION TO STRIKE RESPONDENTS' SUPPLEMENTAL BRIEF

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April 14, 2008

Pursuant to Supreme Court Rule 21, petitioners Republic of Iraq et al. move to strike respondents' supplemental brief filed on April 13, 2009 because it violates Supreme Court Rule 25.5. Whereas the rule permits the filing of a supplemental brief only to present "intervening matter that was not available in time to be included in a [merits] brief," respondents' purported supplemental brief contains no such intervening matter and is simply a sur-reply brief that is not permitted by the rules. All the points addressed in the supplemental brief were covered in petitioners' opening brief, in the United States' brief, and extensively in respondents' own multiple responsive briefs. Respondents are of course entitled to choose new counsel to present oral argument to the Court after briefing has been completed. But that counsel is not thereby entitled to violate the Court's rules by also presenting an unauthorized sur-reply brief only a week before argument.[1]

DISCUSSION

Respondents do not even pretend that their brief involves "intervening matter that was not available in time to be included in a [merits] brief." Sup. Ct. 25.5. Respondents contend only that they are entitled to file a "response" to points made in petitioners' *reply* brief. *See* Supp. Br. 1 (arguing that because "Iraq's reply brief now devotes nine pages to the issue," respondents are entitled to a "supplemental response"); *id.* at 1, 2, 3, 4 (responding to points in the reply brief). But that is the very definition of a sur-reply. Indeed, all the authority cited in the supplemental brief pre-dates the merits briefing in these cases, in one instance by

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1 Given the late date at which respondents filed their brief, petitioners will also be filing a conditional response to that brief for consideration in the event respondents' brief is not stricken.

more than 50 years. If respondents are entitled to file this brief, then *any* respondent would be entitled to file a sur-reply in *any* case without leave of Court (with an attendant sur-sur-reply by petitioners). The rules do not allow this.

What is even worse, the issue addressed in the supplemental brief was expressly covered in petitioners' opening brief, in the brief for the United States, and quite extensively in respondents' two opposition briefs. Respondents expressly *admit* that the issue addressed in their "supplemental brief" was addressed in petitioners' opening brief. *See* Supplemental Br. 1 ("Iraq's opening brief addressed that issue * * *."). It was also addressed in the brief for the United States, which was filed before respondents' merits briefs, *see* U.S. Br. 19-21, and was covered in detail in respondents' *own* two merits briefs (as well as in numerous amicus briefs supporting them). *See* Beaty Resp. Br. 7-25; Simon Br. 42-45, 48-49. Indeed, the *Beaty* respondents devoted almost their entire argument to this issue. Petitioners' reply brief thus devoted far *less* attention to these points than did respondents' own briefs, and all of petitioners' arguments served the precise function of a reply brief: to respond to arguments advanced in respondents' briefs. Respondents may now believe that their original arguments were insufficient, but that does not entitle them to violate the Court's rules—and fundamental fairness—by filing an unauthorized sur-reply only a week before argument.

The Court has denied motions by respondents to file sur-replies even where respondents have forthrightly labeled the briefs as such and sought leave to file them well in advance of oral argument. *See, e.g.*, *Stewart* v. *Dutra Construction Co.*, 542 U.S. 964 (2004); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 510 U.S. 961

(1993). The Court should follow that same course here, where respondents have wrongly invoked Rule 25.5 to file an unauthorized sur-reply that contains not a single "intervening matter that was not available in time to be included in a brief," Sup. Ct. R. 25.5, and in fact addresses issues that were thoroughly addressed in their own merits briefs as well as the preceding briefs.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court strike respondents' supplemental brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan S. Franklin, a member of the Bar of this Court, certify that on this 14th day of April, 2009, a copy of the Petitioners' Motion to Strike Respondents' Supplemental Brief was sent by overnight delivery to:

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I further certify that all parties required to be served have been served.

Jonathan S. Franklin

objections to other provisions of this bill, including section 1079 relating to intelligence matters, I urge the Congress to address the flaw in section 1083 as quickly as possible so I may sign into law the National Defense Authorization Act for Fiscal Year 2008, as modified. I also urge the Congress to ensure that any provisions affecting servicemember pay and bonuses, as well as provisions extending expiring authorities, are retroactive to January 1, 2008.

GEORGE W. BUSH

THE WHITE HOUSE,

December 28, 2007.

APPENDIX B — RELEVANT STATUTE

Emergency Wartime Supplemental Appropriations Act, 2003. Public Law 108–11—Apr. 16, 2003

* * * *

CHAPTER 5
BILATERAL ECONOMIC ASSISTANCE
FUNDS APPROPRIATED TO THE PRESIDENT

* * * *

GENERAL PROVISIONS, THIS CHAPTER

* * * *

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102–484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102–484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with

respect to programs of international organizations for Iraq: *Provided further,* That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further,* That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further,* That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further,* That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

APPENDIX C — OMB LETTER DATED MARCH 25, 2003

THE WHITE HOUSE

WASHINGTON

March 25, 2003

Dear Mr. Speaker:

On October 16, 2002, I signed into law the "Authorization for Use of Military Force Against Iraq Resolution of 2002" (Public Law 107-243). After condemning Saddamm Hussein's continued possession of chemical and biological weapons, obstruction of inspections, and brutal repression of the Iraqi people, the Congress affirmed, "Iraq poses a continuing threat to the national security of the United States and international peace and security of the Persian Gulf region and remains in material and unacceptable breach of its international obligations."

Subsequent to enactment of Public Law 107-243, the United Nations Security Council unanimously agreed to Resolution 1441 offering Iraq one final chance to disarm. After more than a decade of deceit and defiance, the regime, yet again, failed to "fully and unconditionally" comply. Iraq continues to pose a grave danger to global peace and security. The United States and our allies must seek to disarm Iraq and liberate the Iraqi people, and we will prevail.

Today, I submit a request for 2003 supplemental appropriations to support Department of Defense operations in Iraq and to strengthen the capabilities of

our friends and allies who will share the burden of military and stabilization activities. Disarming and liberating Iraq is a first step. This request also provides immediate humanitarian relief, support for reconstruction and the development of a free-market democracy in Iraq. Finally, the request will enhance the safety and well-being of Americans at home and abroad with investments managed by the Department of State, the Department of Homeland Security, and other agencies.

This request reflects urgent and essential requirements. Much of the funding has been requested with flexible authorities. This flexibility will ensure requirements can be immediately addressed as they arise despite the unpredictable scope, duration and intensity of operations. I ask the Congress to appropriate the funds as requested, and promptly send the bill to me for signature. I urge the Congress to refrain from attaching items not directly related to the emergency at hand.

This supplemental request provides essential support to guarantee the success and safety of our men and women in uniform, to help enhance the security of America and her citizens, and to establish an Iraqi nation, free, prospering and at peace with her neighbors.

Sincerely,

s/ [illegible]

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Enclosure

Appendix C

Estimate No. 4
108th Congress, 1st Session

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20003

March 25, 2003

The President

The White House

Submitted for your consideration are requests for FY 2003 supplemental appropriations that would provide funds to cover military operations, relief and reconstruction activities in Iraq, ongoing operations in the global war on terrorism, enhancements to the safety of U.S. diplomats and citizens abroad, support for U.S. allies critical to succeeding in the war, and homeland security protection and response measures.

You have made the decision to use all necessary means to enforce multiple U.N. Security Council Resolutions and implement the Joint Congressional Resolution to disarm Iraq. To achieve these objectives, enhance security in the United States, and support crucial friends and allies, the request for supplemental funds includes:

Department of Defense and classified activities

$62.6 billion is requested to address the costs related to military operations against Iraq and sustaining

efforts in the continuing global war on terrorism. The request includes funds for preparatory costs already incurred, the estimated costs associated with military operations against Iraq, and replenishing munitions that are likely to be expended. The proposal also includes funds to support other nations in the global war on terrorism

The request is built on the key assumption that U.S. military action in Iraq will be swift and decisive. We are seeking funds in a consolidated emergency response account which will allow the maximum flexibility to promptly transfer funds as needed to the appropriate agency, service, or account as the war advances. The request includes:

Defense Emergency Response Fund ($59.9 billion)

- *At least $53.4 billion for Military Operations in Iraq.* This amount would cover the costs associated with: the mobilization to active duty of Reserve and National Guard personnel to support military operations on a full-time basis, including pay, travel, per diem, and health care; personnel necessary to maintain critical manning at authorized levels and special pays, such as Imminent Danger Pay, Family Separation Allowance, and Foreign Duty Pay; support for active duty military personnel; and, operations, such as incremental flying hours, ship steaming days, ground operations, special airlift missions, increased associated ship and aircraft maintenance, associated logistics support, fuel

purchases, base support, and reconstruction. These funds also will reimburse accounts used for projects completed or underway that were necessary to prepare for military action in Iraq.

- *Up to $3.7 billion for Munitions Replenishment.* These funds would be used to replenish munitions expended during military operations in Iraq and in the global war on terrorism. These funds could be used to replace precision munitions, ammunition, and other conventional munitions in order to restore inventories to pre-conflict levels.

- *At least $1.7 billion for Classified Activities.* These funds would cover the costs associated with classified activities undertaken in Iraq and in the global war on terrorism.

- *Up to $1.1 billion for Equipment Procurement and Research and Development.* These funds would be used to develop, procure, and upgrade systems necessary to prosecute the global war on terrorism, including operations in Iraq. These systems include command, control, communications, computer and intelligence equipment, chemical and biological detection and decontamination gear, targeting devices, and spare and repair parts needed to keep pace with increased operational tempo.

Appendix C

Other Defense Accounts ($2.7 billion)

- *$1.4 billion to Support Coalition Partners.* These funds would assist key cooperating nations supporting military operations in Iraq and the global war on terrorism.

- *$0.7 billion for Other Programs.* These funds would cover the costs to repair potential damage to Iraqi oil facilities and assure an adequate internal distribution infrastructure. Funds would also continue U.S. efforts to support Colombia's unified campaign against narcotics trafficking and terrorist activities and would continue training of the Afghan National Army.

- *$0.4 billion for Fuel.* This amount would cover the increased cost of fuel.

- *$0.2 billion for Military Construction.* These funds would be used to construct facilities in Guantanamo Bay, the government's focal point for the processing, interrogation, adjudication, and detention of enemy combatants captured in the global war on terrorism. The funds also would cover construction of taxiways, parking aprons at Air Force facilities in the Middle East, and construction of housing and facilities for military and civilian personnel of coalition partners supporting the global war on terrorism.

Appendix C

Department of State

- $296 million is proposed for necessary operating costs for the Department of State, evacuation of U.S. citizens worldwide, and assistance for refugees or internally displaced persons due to the conflict with Iraq.

- *$101 million for Diplomatic and Consular Programs.* These funds would provide for additional operating costs for the Department of State globally, in Iraq, and to enhance worldwide security programs.

- *$66 million for Emergencies in the Diplomatic and Consular Service.* These funds would be used to evacuate U.S. government employees and private citizens and to provide additional services to American citizens should the need arise. Funds would be returned to the Treasury if unused by year's end.

- *$50 million for the U.S. Emergency Refugee and Migration Assistance Fund (ERMA).* These funds would replenish resources to enable this account to respond to urgent, unforeseen refugee and migration events. ERMA funds were used to support international organizations' prepositioning of supplies related to potential conflict.

- *$34 million for the Andean Counterdrug Initiative.* These funds would be used for needed security and counterdrug assistance in Colombia.

- *$25 million for International Narcotics Control and Law Enforcement.* These funds would be used for border security requirements in Pakistan.

- *$20 million for Embassy Security, Construction and Maintenance.* These funds would be used for immediate temporary facilities for State Department and other agency employees in Iraq.

International Assistance Programs

- $5.02 billion is requested to support key coalition partners in the conflict with Iraq and in the global war on terrorism. This request includes:

- *$2.1 billion for Foreign Military Financing.* These funds will strengthen the forces of our partners and allies in military and stabilization operations in Iraq and the ongoing war on terrorism. $1 billion would be made available for Israel to enhance security in light of threats posed by the war with Iraq.

- *$2.4 billion for the Economic Support Fund (ESF).* These funds would provide critical economic support to Jordan, Turkey, Afghanistan, and Egypt and support educational and economic opportunities in the Middle East In addition, loan guarantees will be made available to Israel. Of the total requested for ESF, $40 million would reimburse amounts used to preposition relief and reconstruction supplies and services prior to the conflict.

- *$0.2 billion for Peacekeeping Operations.* These funds would assist coalition partners and front line states supporting operations in Iraq, including funding for follow on stabilization activities.

- *$150 million for the United States Emergency Fund for Complex Foreign Crises.* This contingency fund would be used for a range of unforeseen needs including support for stabilization operations in Iraq. Use of this Fund would require a Presidential determination that a complex emergency exists and that it is in the national interest to use the Fund to respond to it.

- *$120 million for International Disaster Assistance ($80 million) and Child Survival and Health Programs Fund ($40 million).* These resources would reimburse these

accounts for funds used to preposition people, supplies, and commodities prior to the conflict with Iraq.

- *$28 million for Nonproliferation, Anti-Terrorism, Demining and Related Programs.* These funds would be used in Afghanistan for antiterrorism training, protection equipment, and demining, and for antiterrorism training programs in other countries.

- *$22 million for Operating Expenses of the Agency for International Development (USAID).* These funds would help cover the cost of potential evacuations of USAID personnel, fund start-up costs for USAID operations in Iraq, and help cover costs of the USAID Inspector General for auditing reconstruction and relief activities in Iraq.

Broadcasting Board of Governors

- *$30.5 million for International Broadcasting Operations.* These funds would be used to accelerate Middle East Television Network start-up and increase radio broadcasting to Iraq.

Appendix C

Homeland Security Requirements

- $4.25 billion is proposed to address Homeland Security requirements, which includes:

- *$3.5 billion for the Department of Homeland Security.* This would provide $1.5 billion for prevention and response operations of departmental agencies, such as increased border and maritime operations, including Coast Guard support of the Department of Defense; and $2.0 billion for Office for Domestic Preparedness assistance to state and local governments to support federally-coordinated terrorism prevention and security enhancements at this time of heightened threat, and terrorism preparedness for first responders.

- *$500.0 million for the Department of Justice.* These funds would support immediate and emerging terrorism-related prevention and response requirements, including additional intelligence and investigative activities.

- *$250.0 million for the Executive Office of the President's Emergency Response Fund.* These funds would support immediate and emerging terrorism-related prevention and response requirements throughout the federal government.

Appendix C

Specific homeland security requirements must be flexible enough to meet emerging threats or respond to attacks, so precise allocation of these funds cannot be determined in advance. Congressional notification would be provided 15 days prior to any anticipated allocation of funds.

Executive Office of the President (EXOP)

- *$2.4 billion is requested for EXOP for Relief and Reconstruction in Iraq.* This request would fund a new flexible account focused on Iraq relief and reconstruction. $1.7 billion is requested to support reconstruction in the areas of health, water/sanitation, education, electricity, transportation, telecommunications, rule of law/governance, economic and financial policy, and agriculture. $543 million is requested for humanitarian assistance to refugees, internally displaced persons, and vulnerable individuals, including humanitarian demining in and around Iraq. In addition, up to $200 million will be available to replenish accounts drawn down to buy emergency food stocks for the Iraqi people. Flexible authorities for this acccunt will allow quick transfer of funds to all agencies involved in relief and reconstruction as requirements are defined. These funds are in addition to reimbursements for costs already incurred to preposition relief supplies. The total commitment of resources for Iraq relief and reconstruction is approximately $3.5 billion.

This includes funds made available under the Do D heading for oil field repair, contingency accounts, and reimbursement for pre-positioning supplies.

- Additional funding for the Executive Office of the President is discussed under Homeland Security Requirements.

Legislative Branch

- *$125 million is requested for the Legislative Branch.* These funds would support immediate and emerging terrorism-related prevention and response requirements throughout the Legislative Branch.

I have carefully reviewed these proposals and am satisfied that they are necessary at this time. Therefore, I join the heads of the affected Departments and agencies in recommending you transmit the proposals to the Congress.

Sincerely,

s/ Mitchell E. Daniels, Jr.
Mitchell E. Daniels, Jr.
Director

Enclosures

Appendix C

GENERAL PROVISIONS

Sec. ___. *Any appropriation made available in this Act for "International Assistance Programs," for "Department of State," or under the heading, "Iraq Relief and Reconstruction Fund" under "Executive Office of the President," may be transferred between such appropriations for use for any of the purposes for which the funds in the such receiving account may be used: Provided, That the total amount transferred shall not exceed $200,000,000.*

This would allow transfers among the accounts in the International Assistance Programs, the Department of State portions of this request, and the new Iraq Relief and Reconstruction Fund, with a cumulative cap of $200 million. This will allow the President to move funds between accounts to provide the most effective possible aid to the Iraqi people and support to our allies in the conflict in Iraq and the war on terrorism.

Sec. ___. *Assistance or other financing under this Act or under prior foreign operations, export financing, and related programs appropriations Acts may be provided to support relief and reconstruction in Iraq notwithstanding any other provision of law.*

This would extend the authority to provide relief and reconstruction assistance for Iraq "notwithstanding any other provision of law" that is provided in the FY 2003 Consolidated Appropriations Act. The authority in the Consolidated Appropriations Act expires once a supplemental appropriation for Iraq is enacted. This

authority continues to be needed to ensure that relief and reconstruction assistance for Iraq may be provided swiftly and flexibly.

Sec. ___. *The Iraq Sanctions Act of 1990 is hereby repealed: Provided, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102-484): Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism: Provided further, That section 307 of the Foreign Assistance Act of 1961, as amended, shall not apply with respect to programs of international organizations for Iraq: Provided further, That provisions of law that purport to direct the United State Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq should not be construed as applying to Iraq.*

This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

Appendix C

Sec. ___. *Notwithstanding any other provision of law herafter, the President may authorize the export to Iraq of any item subject to the Export Administration Regulations, 15 CFR chapter VII, subchapter C, or controlled under the International Trafficking in Arms Regulations on the United States Munitions List established pursuant to section 38 of the Arms Export Control Act, 22 U.S.C. 2778, if the President determines that the export of such item is in the national interest of the United States.*

This would provide the President with the flexibility to authorize exports to Iraq upon determining that they are in the national interest of the United States, notwithstanding statutory restrictions, in addition to those in the Iraq Sanctions Act, and those under the Arms Export Control Act on exports to Iraq.